

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Protest of)	
)	
Knowledge Connections, Inc.)	Docket No. 06-TSA-024
)	
Solicitation No. DTFAWA-HSCEAM-06-R-00014)	

DECISION ON TSA MOTION TO DISMISS PROTEST

I. INTRODUCTION

This matter is before the Federal Aviation Administration’s Office of Dispute Resolution for Acquisition (“ODRA”) on the Transportation Security Administration’s (“TSA”) Motion to Dismiss the above captioned Protest which was filed by Knowledge Connections, Incorporated (“KCI”). KCI’s Protest challenges the terms of Solicitation No. DTFAWA-HSCEAM-06-R-00014 (“Solicitation”), which was issued by the TSA to procure reservation support services for the Federal Air Marshal Service (“FAMS”). KCI is the incumbent provider of these services under a contract that is scheduled to expire May 6, 2006.

In its Motion, TSA argues that KCI’s Protest should be summarily dismissed because it fails to state a claim upon which relief may be granted. *See* ODRA Procedural Regulations, 14 C.F.R. § 17.19(a)(2). According to TSA, the allegations presented by KCI are not reviewable in the context of a bid protest because they challenge matters of contract administration, or are otherwise legally insufficient. Notably, the TSA emphasizes that, in response to KCI’s earlier March 17, 2006 agency-level protest—which listed six core grounds of protest, along with thirty-five “questions and concerns”—the TSA posted detailed explanations responding to each of the KCI’s

allegations, and even revised several solicitation terms as a result of KCI's challenge. *See Protest of Knowledge Connections, Inc., Decision on Request for Suspension of Activities* dated April 21, 2006, 06-TSA-024 ("Suspension Decision").

For the reasons discussed below, the ODRA concludes that the Protest fails to state a claim upon which relief may be granted in the context of a bid protest and therefore must be summarily dismissed. Under a Delegation of Authority from the TSA dated December 23, 2003, the ODRA Director is authorized "to grant or deny motions for dismissal or summary relief, submitted to the ODRA by parties to protests and contract disputes" *See TSA Delegation* at Subparagraph (b).

II. BACKGROUND

A. The ODRA Decision On The Protester's Suspension Request

In addition to challenging various terms of the Solicitation, KCI's Protest requested that the new acquisition be suspended for the duration of its Protest at the ODRA. *See Protest*, ¶ 2. On April 6, 2006, the TSA filed its Opposition to the requested suspension. TSA argued that the Protester had failed to allege the "substantial case" required by the first prong of the ODRA's 4-part suspension analysis. The TSA also argued that KCI's Protest similarly failed to allege that "compelling reasons" required the suspension. *Id.* In a decision dated April 21, 2006, the ODRA denied the suspension request. *See Suspension Decision, supra.*

B. KCI's Opposition to the TSA Motion to Dismiss

During an April 7, 2006 Status Conference with the parties, the ODRA instructed KCI to respond to the TSA Motion to Dismiss by close of business on April 18, 2006. *See Status Conference Memorandum*, dated April 7, 2006. Since no submission was received on that date, the ODRA directed the Counsel for KCI to "show cause" why the TSA Motion to Dismiss should not be granted as unopposed. *See ODRA Letter to KCI Counsel*, dated April 19, 2006. In a letter to the ODRA dated April 20, 2006, the Counsel for KCI

advised that his legal representation of KCI was limited to its Contract Dispute that he had separately filed at the ODRA on March 23, 2006. Despite being served by TSA with a copy of the current Motion to Dismiss, the KCI Counsel advised the ODRA that he considered this to be an informational copy that was unrelated to the KCI Contract Dispute. As a result, the KCI Counsel reports that he did not respond to the TSA Motion to Dismiss, nor did his client.

By letter dated April 21, 2006, the ODRA reminded the Counsel that all the parties—including both KCI and its Counsel—had participated in the April 7, 2006 ODRA Status Conference during which the ODRA established the filing deadlines for both the TSA Motion and KCI's Opposition response. In addition, since the record confirmed that the KCI Counsel had been expressly copied with every correspondence related to both the KCI Protest and the KCI Contract Dispute, the ODRA concluded that the TSA had properly served the current Motion to Dismiss on KCI's Counsel. Despite finding the Counsel's explanation to be unpersuasive, the ODRA concluded that in the interest of fairness, KCI's filing deadline for its opposition should be extended until the close of business on April 26, 2006.

On that date, KCI submitted its Opposition to the ODRA, essentially repeating the challenges set forth in its original Protest. In its Opposition, KCI reiterates its challenge against the Solicitation's minimum experience and security clearance requirements, *id.* ¶ 6 at 4-5, and contends that KCI cannot possibly provide the required level of expertise at the compensation rate specified in the Solicitation's designated Wage Determination. *Id.* ¶ 1 at 1-3; ¶ 7 at 8. KCI also continues to object to the Solicitation as an improper "retaliation" by TSA that has been taken as a result of "KCI's contract dispute with the contracting officer over unreasonable terms and conditions for the incumbent contract performance." *See Opposition*, ¶ 7 at 5.

For the first time, KCI's Opposition also contends that the Protester should receive a small disadvantaged business sole-source award of this requirement pursuant to its General Services Administration's Federal Supply Schedule Contract ("GSA FSS

Contract”) for “Travel Services Solutions.” *Id.* at 6-8; *see also Id., Exhibit 2, Solicitation No. FBGT-RK-040001-B, GSA FSS Contract for Travel Services Solutions*, dated July 19, 2004. According to KCI, the TSA is required by the Federal Acquisition Regulation (“FAR”) to procure the required reservation support services from KCI. *Id.* at 6-8. OSI also reports that it is entitled to a small disadvantaged business sole-source award for these services because otherwise, “upon the loss” of its incumbent contract, KCI will “fai[l] to reach the competitive award goals” required by the Small Business Administration, which will preclude it from qualifying for “an additional \$2 million of optional awards” under the SBA’s small disadvantaged business program. *Id.*

The remaining challenges in KCI’s Opposition repeat earlier protest arguments by KCI that: (1) the Solicitation improperly restricts the use of corporate discipline policies, *id.*, ¶ 2 at 3; (2) the Solicitation’s quality assurance plan is “vague;” *id.* ¶ 4 at 3; (3) federal procurement policy encourages contracting with KCI as it is a Service Disabled Veteran Owned company; *Id.*, ¶ 7(b) at 12; and (4) the conversion of the Solicitation from a “fixed price labor hours” to a “time and material” type contract is improper, *Id.*, ¶ 7(d) at 12.

III. DISCUSSION

A. The ODRA’s Jurisdiction Over TSA Protests and Contract Disputes

Following the enactment of the Aviation & Transportation Security Act of 2001 (“ATSA”), 49 U.S.C. § 114—which provides that the FAA’s Acquisition Management System (“AMS”) may be modified for use by the TSA, as considered appropriate—the TSA has and adopted and used the guidance and principles outlined in the FAA AMS and as the “basis” for the TSA AMS, which applies to all designated TSA solicitations, contract awards, and contracts. *See* AMS § 3.9.1; 49 U.S.C. § 114. Consistent with its adaptation of the FAA AMS—and pursuant to its authority under the ATSA—the TSA

also executed a December 23, 2003 Delegation¹ that gives the Director of the ODRA the following exclusive authority “in all dispute resolution actions involving designated solicitations issued and contracts awarded by” TSA to: “administer individual procurement related protests and contract disputes;” “grant or deny motions for dismissal or summary relief” related to these actions; temporarily stay an award or contract performance where the Director “finds compelling reasons;” “dismiss protests and contract disputes” that have been settled by the parties or withdrawn; issue procedural, interlocutory, and/or protective orders for “efficient” case management—including overseeing discovery; and encourage the use of voluntary ADR as the primary means of resolution of bid protest and contract disputes, and “issue findings and recommendations to the Administrator through the Chief Counsel of the TSA for final Agency decisions in all such matters.” *See TSA Delegation of Authority*, dated December 23, 2003, ¶ a through ¶ i; and ¶ k. Finally, the 2003 Delegation also authorizes the Director of the ODRA to:

Take all other reasonable steps deemed necessary and proper for the management of the TSA Dispute Resolution System and for the resolution of protests and contract disputes, in accordance with the TSA [AMS], the ODRA Procedural Regulations . . . and applicable law.

Id., ¶ j; *see also Protest of MAXIMUS, Inc.*, 04-TSA-009, *Decision Denying Motions to Dismiss* dated September 20, 2004 (discussing TSA’s 2003 Delegation at 2).

Most recently, in the Department of Homeland Security (“DHS”) Appropriations Act Congress established that beginning in Fiscal Year 2006, the TSA AMS would “apply to” the TSA’s “acquisition of services, as well as equipment, supplies and materials.” *See Public Law* 109-90, 119 Stat. 2064, 2084 (2005) (codified at 49 U.S.C. § 114 *note*).

¹ The 2003 TSA Delegation is available on the ODRA website at: <http://www.faa.gov/agc/odra>.

B. The Repeated Arguments Are Without Legal Merit

As indicated above, several of the challenges set forth in KCI's Opposition were considered by the ODRA during the adjudication of the Protester's earlier suspension request. In the April 21, 2006 Suspension Decision, the ODRA explained that most of the proffered grounds for protest did not establish a "substantial case" that would warrant granting the suspension request because KCI's Protest challenged matters of contract administration, duplicated arguments set forth in its separately pending Contract Dispute, improperly sought a mandatory sole-source award, or alleged unspecified and unsubstantiated "adverse action" by TSA. For the reasons set forth in that April 21, 2006 Suspension Decision, *see Suspension Decision, supra*, KCI's repetition of these arguments here does not provide a legal basis for the bid protest. *See Decision, supra*

C. The New Protest Ground Is Without Legal Merit

While KCI has presented one new protest ground in its Opposition, alleging that these services must be procured under its GSA FSS Contract, the ODRA will not further consider this ground of Protest since it seeks to cancel a competition in order to mandate a direct sole source award for which there is no legal requirement. As discussed above, the TSA's procurements are not subject to either the FAR or the other federal acquisition laws that govern most executive branch agencies. The ATSA, the TSA Delegation, the AMS as adopted by the TSA, and the 2006 DHS Appropriations Act clearly establish that all TSA procurements are governed by, and subject to the AMS. Since this solicitation was clearly an AMS-based solicitation, compliance with the FAR is not required—and the FAR does not provide a basis for protest. *See Protest of Maximus, Inc., Decision Denying Motions to Dismiss, supra.*

D. KCI's Challenges Against the Solicitation Terms Are Legally Insufficient

KCI's Opposition continues to object to the Solicitation's minimum computer reservation experience and secret clearance requirements for contractor personnel. In its current Motion to Dismiss, the TSA explains that the FAMS mission—deploying Federal Marshals on United States domestic and international air carriers—requires all reservations personnel to have the minimum system experience and secret security clearance because of the “sensitivity of the reservation duties” and because “all personnel with access” to the Division where this requirement is housed must have secret clearances. *See TSA Motion To Dismiss* at 2.

Notably, TSA offered this same argument in its earlier Opposition to the Protester's Suspension Request, which included supporting affidavits from the designated Contracting Officer and also the Assistant Special Agent in Charge of the FAMS Systems Operation Control Division—where these required services will be performed. These affidavits are expressly referenced in the current Motion to Dismiss, *see* ¶ I.B, to support TSA's contention that the new Sabre and/or Apollo experience and the secret clearance “reflects the Government's realization of this experience as a necessary prerequisite for contractor reservation personnel” supporting the FAMS. *Id.* Each declaration provides details relevant to understanding TSA's need for the new minimum experience and security clearance requirements in the Solicitation. As a preliminary matter, the Contracting Officer advises that before proceeding with the Solicitation, the TSA “considered modifying” KCI's incumbent contract and solicited a proposal for personnel meeting the new experience and security clearance qualifications. However, the Protester's submitted proposal did not propose personnel with these qualifications, and “advised that . . . the new specifications for SABRE experience and SECRET clearances justified . . . pricing increases because of their significant nature.” *See TSA Opposition to Protester's Suspension Request, Attachment 1, Declaration of the Contracting Officer*, dated April 6, 2005, ¶ 6 at 1. The fact that the Protester was given the first opportunity to

submit a proposal for the revised requirements severely undercuts the Protester's "retaliation" assertion and is completely inconsistent with the TSA's early and focused attempt to negotiate a response modification with KCI so it could keep performing the work.

The head of the Systems Operations Control Division emphasized that the minimum needs and success for the FAMS deployment require all personnel to have the challenged experience and security clearance qualifications. According to this FAMS official's Declaration:

The FAMS cannot continue under the current contract for reservation support because an undue burden would be placed on the FAMS from an operational, logistical, and security standpoint. Particularly, the current [KCI] contract does not require SECRET clearances for the contracted staff. The Government has [since] made such a requirement mandatory because of the sensitivity of the duties and the contractor's access to classified material. In addition, the Government has since required that all personnel with access to the [Division's] workspace have, at minimum, SECRET clearances.

See TSA Opposition to Protester's Suspension Request, Declaration of Assistant Special Agent in Charge at the FAMS Systems Operation Control Division, dated April 6, 2006, ¶ 5 at 1. This FAMS official also reports that the FAMS Systems Operation Control Division's "experience with the current [KCI incumbent] contract has led [the FAMS] to determine that native SABRE and/or Apollo experience is a necessary requirement for contracted reservation personnel. *Id.*, ¶ 6 at 1.

As the ODRA stated in the Suspension Decision, where a solicitation requirement directly relates to national defense and/or human safety—as is the case here—an agency has the discretion to define solicitation requirements to achieve the highest possible level of reliability and effectiveness. *KCI Suspension Decision* at 11. In this case, the current Motion to Dismiss presented by TSA is well supported and persuasively articulates a rational basis for why the challenged experience and security clearance specifications are

reasonably required to safeguard the official mission of the FAMS. In the case of TSA's detailed Motion to Dismiss, its referenced Opposition to the Protester's Suspension Request, and the supporting Declarations submitted by the FAMS officials, KCI's failure to rebut or otherwise articulate any basis for challenging the Solicitation requirements, beyond its mere disagreement, renders these protest allegations legally insufficient. *See Protest of B&B Cafeteria*, 05-ODRA-00349, *Decision on Motion to Dismiss* dated October 7, 2005.

For similar reasons, the ODRA also dismisses the KCI challenges against the "vast difference" between the solicitation's personnel qualifications and the solicitation's designated Service Contract Act wage rates. Nor will the ODRA further consider KCI's new request—first raised in its Opposition—that these services be procured under its GSA FSS contract. The crux of these challenges is to enable KCI to remove the minimum personnel qualifications discussed above from the solicitation. However, beyond mere disagreement, KCI has failed to articulate any legal basis for challenging them. As was emphasized by the ODRA in the Suspension Decision, it is well established that protest allegations which simply state that particular solicitation terms are objectionable are not viable. *See Decision on Suspension Request*, at 11 (citing *Decision on Protester's Request for Stay of Contract Performance*, *Protest of All Weather, Inc.*, ODRA-04-00294).

Under these circumstances, since KCI has not alleged any facts which, if proven, would constitute improper conduct on the part of government officials or a violation of the AMS, the ODRA finds that KCI has failed to state any legal basis for challenging the Solicitation or the acquisition process.² *See Protest of B&B Cafeteria*, *Decision on Motion to Dismiss*, *supra*; *Bel-Air Electric Construction*, 98-ODRA-00084; *Protest of Contract Services, Inc.*, 96-ODR-0007.

² This dismissal of KCI's Protest does not affect the Contract Dispute that was separately filed by KCI on March 23, 2007, and which is currently pending before the ODRA. Those arguments—which pertain to KCI's incumbent contract performance—will be separately considered and resolved pursuant to the ODRA's Procedural Regulations for Contract Disputes. *See* 14 C.F.R. Part 17.

IV. Conclusion

For the reasons set forth above, the Protest fails to state a matter upon which relief may be granted. The TSA's Motion is granted and the Protest is dismissed summarily on that basis, pursuant to 14 C.F.R. § 17.19(a)(2).

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APPROVED:

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Director
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May 5, 2006